ORIGINAL

No. 82-1273

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

STATE OF MAINE,

Petitioner

v.

RICHARD THORNTON,

Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF THE
STATE OF MAINE

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THE MAINE SUPREME JUDICIAL COURT CORRECTLY CONSTRUED THE FOURTH AMENDMENT BY HOLDING THAT THE "OPEN FIELDS DOCTRINE" OF HESTER V. UNITED STATES, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924), WAS INAPPLICABLE TO THE INSTANT CASE, WHERE A WARRANTLESS SEARCH WAS MADE BY POLICE OFFICERS OF MR. THORNTON'S HEAVILY WOODED 38-ACRE LAND AND WHERE MR. THORNTON MADE EVERY EFFORT TO CONCEAL HIS ACTIVITIES FROM THE PUBLIC AND WHERE THE POLICE OFFICERS WERE NEVER LEGITIMATELY ON DEFENDANT'S PROPERTY?[1]

1 Petitioner incorrectly states in its Petition that the wooded area searched was "beyond the curtilage" of Mr. Thornton's house. The issue of whether the area searched was within the curtilage or not was never decided by the Maine Supreme Judicial Court.

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OPINIONS BELOW

The opinion of the Supreme Judicial Court of Maine in State of Maine v. Richard Thornton, decided on December 6, 1982, is found at Me., 453 A.2d 489 (1982) and is reproduced in the Appendix to this Petition. (A. 1) The opinion denied the State's appeal from a Maine Superior Court Order suppressing observations made and items seized at Mr. Thornton's property by the police. The Maine Superior Court Suppression Order is reproduced in Appendix to this Petition. (A. 9)

JURISDICTION

The judgment of the Maine Supreme Judicial Court in State of Maine v. Richard Thornton, Me., 453 A.2d 489 (1982) was decided and entered and the Court's mandate issued on December 6, 1982. Petitioner timely filed its Petition for Writ of Certiorari within the sixty-day filing period set forth in U.S. Sup. Ct. Rule 20.1.

Petitioner invoked the jurisdiction of the Supreme Court of the United States under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the Constitution of the United States:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

An unidentified informant made a statement that he had been in a wooded area off the Davis Corner Road and had seen what he thought was marijuana growing in the back of a mobile home in the area (A. 2).[2] State Trooper Carroll E. Crandall and Hartland Constable Harold Hartford talked to the informant who did not want to be involved in the prosecutorial activity and who did not know who owned the property on which the marijuana was allegedly growing. (A. 3) This discussion took place on July 31, 1981. (R. 17, 19)[3]

On August 3, 1981[4], Trooper Crandall and Constable Hartford left the Davis Corner Road and walked across the property between the mobile home and an adjacent house until they reached an overgrown woods road, used only as a footpath. The men continued up the woods road and found what they thought to be marijuana growing in two small clearings, fenced in with chicken wire. (A. 3) (R. 20) This entire area was heavily wooded, except for the two clearings with the alleged marijuana patches; it was not possible to see the patches from Mr. Thornton's house, from his driveway, from the public road, or from neighboring land. (A. 3) In fact, a person would have had to search to find a way to the patches. (A. 3)

An old stone wall and barbed wire fence and No Trespassing signs exist around the perimeter of Mr. Thornton's property,

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2 References are to the pages of the Appendix appearing at the end of this Brief appearing in parentheses as follows: (A. ___)

3 References are to pages of the Appendix filed by Mr. Thornton with the Supreme Judicial Court Brief which pages 12-81 of the Appendix refer to the hearing held on April 5, 1982, in the Maine Superior Court, Somerset County on Mr. Thornton's Motion to Suppress appearing in parentheses as follows: (R. ___) The referenced pages appear in the Appendix of this Brief.

4 The opinion of the Supreme Judicial Court states that the search took place on July 31, 1981, an apparent typographical error.

including a sign where the woods road enters Mr. Thornton's property. (A. 3) Mr. Thornton did not let people walk routinely through his property, and the officers had no consent to enter the property on August 3, 1981. (A. 3)

After determining in their opinion that the plants were marijuana, the officers left the property. (A. 3) Trooper Crandall checked maps at the Town Office to "find out for sure" who owned the property on which the plants were growing. Trooper Crandall then filed an Affidavit to obtain a Warrant to search Mr. Thornton's property for marijuana. Trooper Crandall based his belief of probable cause to search on his 1980 observation of marijuana on Mr. Thornton's property, on the August 3, 1981 observations, and on the information supplied by a "reliable, cooperating citizen". (A. 3), (R. 8), (A. 13) Trooper Crandall testified that he did not get a Warrant prior to the warrantless search because "I didn't know exactly where the marijuana was. I didn't know whose property it was on." (A. 3) Mr. Thornton was charged with furnishing marijuana pursuant to 17-A Maine Revised Statutes Annotated (M.R.S.A.) § 1106.

Pursuant to Mr. Thornton's Motion for Suppression of evidence, the Superior Court Justice found that because the District Attorney abandoned any effort to prove probable cause, based on the informant's testimony, that sufficient probable cause for a valid Warrant depended on Trooper Crandall's observations. (A. 3, 9, 10) The Justice further stated that the District Attorney had conceded that Trooper Crandall's initial visit was a warrantless search and that the central issue was a determination of whether the search came within an exception to the warrant requirement. (A. 3, 10)

The Superior Court Justice concluded that the two officers entered Mr. Thornton's property, which was posted with a number of signs prohibiting trespassing and hunting, by walking part way along Mr. Thornton's property and then crossing a stone wall.

(A. 3, 10). The officers entered the property without license in order to corroborate the informant's tip. (A. 3, 10, 11). The secluded, wooded location chosen by Mr. Thornton for the patches, and Mr. Thornton's efforts to exclude the public from his property evidenced his reasonable expectation of privacy on his property. (A. 3, 11). Because the officers were not innocently on public property, property of unknown ownership, or neighboring property and because no other exception to the warrant requirement was applicable, the Superior Court Justice found that the officers' visit to Mr. Thornton's property was an unlawful search. (A. 3, 4, 11). After finding that the information obtained from Trooper Crandall's 1980 search was stale in 1981 and may have also been obtained during an unlawful search and that the observations made during the August 3rd unlawful search could not supply probable cause, the Justice ruled that the Warrant issued for the search and seizure was invalid. (A. 4, 11). He, therefore, suppressed evidence of observations made and items seized on Mr. Thornton's property. (A. 4, 11, 12).

On appeal to the Maine Supreme Judicial Court, the State contended:

(1) Three of the Superior Court Justice's findings of fact were clearly erroneous;

(2) That Mr. Thornton could have had no reasonable expectation of privacy; and

(3) That the Superior Court Justice erred in failing to apply the "open fields doctrine". (A. 4)

The Maine Supreme Judicial Court found that the first finding of fact that Mr. Thornton's property was posted with signs prohibiting trespassing and hunting was not clearly erroneous because Mr. Thornton's wife testified directly to the fact that such signs were posted on the property, and the defense also offered into evidence photographs of the No Trespassing sign. (A. 4)

The second finding of fact regarding whether or not officers went partly up Mr. Thornton's driveway was found not to be clearly erroneous because the Superior Court Justice was not compelled to accept the officers' testimony on the point, even if it was uncontradicted, and the Court also found that if the Superior Court's finding was erroneous, it was a harmless error. (A. 4)

The third finding of fact that the two officers crossed the stone wall in disrepair was also found not to be erroneous because of Mr. Thornton's wife's testimony regarding the stone wall. The Maine Supreme Judicial Court noted that "due regard shall be given to the opportunity of the Trial Court to judge the credibility of the witnesses." (A. 4, 5)

In addressing the State's contentions that Mr. Thornton had no reasonable expectation of privacy in the area searched, the Maine Supreme Judicial Court also accepted the findings of the Superior Court Justice that Mr. Thornton's effort to conceal the patches and to exclude the public from his land evidenced a reasonable expectation of privacy. (A. 5)

The Maine Supreme Judicial Court noted that it has never been the law of the State of Maine that any expectation of privacy for activity conducted in an area accessible to the public is, per se, unreasonable. Rather, the proper inquiry must be:

> "[H]aving in mind the purposes to be served by the Fourth Amendment, made applicable to the States by the Fourteenth, should we not disregard such conclusory property law concept and determine the reasonableness of the police entry by responding to the following relevant inquiry, what under all the existing circumstances, if any, wholly defeated or partially reduced under the law, the reasonable expectation of privacy which the occupants ... had a right to entertain?" Crider, 341 A.2d at 5. (A. 6, 7) [Reference is to State v. Crider, Me., 341 A.2d. 1 (1975)]

Under the circumstances of this case, the Maine Supreme Judicial Court found nothing that could have been taken to have wholly defeated or partially reduced Mr. Thornton's reasonable expectation of privacy, except the visit by the officers to his

property for the specific and admitted purpose of gathering information for a subsequently procured Search Warrant. (A. 7)[5]

The Maine Supreme Judicial Court also found that the Superior Court Justice's conclusion concerning the availability of the "open fields doctrine" exception to the Search Warrant requirement under the circumstances was correct. (A. 7, 8) The Court noted that for the "open fields doctrine" to apply, two factual aspects of the circumstances must be considered:

> (1) the openness with which the activity is pursued ...; and

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[5] The following testimony elicited by the prosecutor of Mrs. Thornton established that there was a subjective expectation of privacy in the area searched:

Q BY MR. ALSOP: Have you been out to these plots?
A MRS. THORNTON: Yes, I have.
Q And more than once during the course of the summer of 1981?
A Yes.
Q And were you aware of what was growing out there?
A Yes.
Q Is that in fact why they were growing out in that area?
A Yes.
Q Is it fair to say that you or your husband did not want it to be viewed from the road; is that true?
A True.
Q In fact, they were out in a well-wooded area?
A That's true.
Q And the fence around them was to keep out the animals?
A Anything that would bother it, not necessarily animals.
THE COURT: Police and things like that?
Q BY MR. ALSOP: Was it possible to see through the fence?
A If you looked through the fence, yes.
Q How do you get inside of those fences?
A Pull the wire down.
Q So there was no gate on it or anything of that sort?
A No. You would have to search to find your way in. (R. 67)

Mr. Thornton's attorney elicited the following statement from Mrs. Thornton:

Q BY MS. ZEEGERS: Have you or your husband ever allowed anyone to to routinely walk through your property to get to anyone else's property, or to the road?
A MRS THORNTON: No.
Q And you have not allowed hunters on your property?
A No. (R. 60)

(2) the lawfulness of the officers' presence during their observation of what is open in patent. (A. 7)

In the circumstances of this case, the Supreme Judicial Court found that the State could not demonstrate either requirement for the application of the "open fields doctrine". (A. 7)

REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED

I. THE PETITION FOR A WRIT OF CERTIORARI SHOULD NOT BE GRANTED PURSUANT TO U.S. SUP. CT. RULE 17.1(c) BECAUSE THE DECISION OF THE MAINE SUPREME JUDICIAL COURT IS CONSISTENT WITH QUESTIONS OF FEDERAL LAW SETTLED BY THIS COURT.

The Petitioner incorrectly states that the Maine Supreme Judicial Court held that the property searched was "beyond the curtilage of a home". (Petitioner's Brief at 14) In the present case, the Maine Supreme Judicial Court did not hold that the area searched was beyond the curtilage. (See footnote 1 supra)

However, even if the property search were determined to be beyond the curtilage of Mr. Thornton's home, the decision of the Maine Supreme Judicial Court in the present case is one that has been settled by this Court. Petitioner states at page 16 of its Brief that the Maine Supreme Judicial Court interpreted the Fourth Amendment to permit people to invoke its protections for illicit activities conducted beyond the curtilage of their home by simply posting and fencing their property. This conclusion is erroneous. First, there was no holding that the area searched was beyond the curtilage. Second and more importantly, the Supreme Judicial Court made a thorough analysis of the Hester and Katz doctrines reconciling its decision to be consistent with both of those doctrines. Hester v. United States, 265 U.S. 57,

44 S.Ct. 445, 68 L.Ed. 898 (1924), Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

In the present case, the Maine Supreme Judicial Court held that for the "open fields doctrine" to apply, two factual aspects of the circumstances must be considered:

> (1) The openness with which the activity is pursued, Peakes, 440 A.2d at 353...; and
>
> (2) The lawfulness of the officers' presence during their observations of what is open and patent. Dow, 392 A.2d at 535...Under the circumstances, the State must demonstrate the legitimacy of the officers' position of observation and the openness of the conduct in order to prove that the expectation of privacy is not objectively reasonable and that, therefore, police observations do not constitute a search. (A. 7) [State v. Peakes, Me., 440 A.2d 350 (1982); State v. Dow, Me., 392 A.2d 532 (1978)] (A. 7)

The Court held that in the circumstances of this case, the State could not demonstrate either requirement for the application of the "open fields doctrine". (A. 7) The Court found that Mr. Thornton made every effort to conceal his activity, that nothing about his enterprise was open, patent or knowingly exposed to the public. (A. 7). In addition, the Court found that the officers were never legitimately on Mr. Thornton's property; that they entered Mr. Thornton's land without a Warrant, and with no exception to the warrant requirement, for the specific purpose of verifying information to be used ultimately against him. (A. 7, 8)

The Supreme Judicial Court further noted that the State made an erroneous assumption that the "heavily wooded" area searched was an area akin to an "open field". The Supreme Judicial Court stated that the State's erroneous assumption precluded the need for further Fourth Amendment analysis. The Court stated:

> "The determination of a lawful search and seizure under Fourth Amendment analysis does not involve plugging in one of several mutually exclusive theories or doctrines, such as the "open fields" doctrine, depending on the particular facts. Surely, a determination

of Fourth Amendment protection involves a more cohesive and reasoned approach." (A. 8)

The Maine Supreme Judicial Court carefully stated that the Hester and Katz doctrines must be reconciled, noting that under both analyses, the reasonableness of any subjective expectation of privacy would be questioned. (A. 8)

> "There is little doubt that the Katz majority would have agreed that Hester had no reasonable expectation of privacy in distributing moonshine whiskey in an open field on his father's land. Katz, 389 U.S. at 361, 88 S.Ct. at 516, 19 L.Ed. 2d at 588 (Harlan, J., concurring)" (A. 8)

The Maine Supreme Judicial Court stated that the point was not that the area of the marijuana patches was accessible to the public or that under different circumstances, Mr. Thornton's land might have been open woods. The dispositive point was that the actions of Mr. Thornton indicated that he expected his land to be a private place. (A. 8)

Mr. Thornton's subjective expectation of privacy was not found to have existed simply because the field was posted and fenced as Petitioner contends in its Brief at page 18. (See footnote 4 supra)

The fact that the Fourth Amendment does not apply to "open fields" pursuant to Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924) is irrelevant to the present case. As the Maine Supreme Judicial Court noted, the area searched is not akin to an open field.

The fact that the United States Supreme Court granted Certiorari in the case of Florida v. Brady, et al., 379 So.2d 1294 (Fla. App. 1980), cert. granted 50 U.S.L.W. 3864 (U.S. May 24, 1982), (No. 81-1636) does not compel the granting of Certiorari in the present case. Brady involved the search of an 1800 acre area of open fields where the only apparent testimony regarding a reasonable expectation of privacy was the fact that No Trespassing

signs and a fence encircled the property. In the present case, other testimony revealed that Mr. Thornton himself did have a subjective reasonable expectation of privacy beyond the signs and the fence. (See footnote 4, supra) Also, the Court in Brady implied that Hester, supra was no longer viable.

> In reaching its conclusion the First District ignored the United States Supreme Court's shift to a reasonable right of privacy test[4] and reverted to the Hester, supra, view of fourth amendment property rights around the dwelling house and curtilage, regardless of whether the surrounding fields were fenced. 379 S.2d. 1294 at 1296 (footnote omitted).

Much of the confusion regarding the open fields doctrine has arisen not from a lack of ruling on the part of this Court but in a failure to distinguish between the holding in Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 and the birth of the open fields doctrine in Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928).

In Hester, supra., this Court held that federal agents could trespass on an area where the public was not excluded during a warrantless search and view that which was exposed to the public without violating the Fourth Amendment. That which is observable by the public is observable by a federal agent without a warrant. 265 U.S. 57 (One must note, however, that in the present case, the Maine Supreme Judicial Court determined that the public was excluded on Mr. Thornton's land, and the land was not exposed to the public).

The following year, the open fields doctrine was born in Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928). The doctrine is a combination of the "open field" phrase coined in Hester and Olmstead's holding that the Fourth Amendment is not violated unless there has been "an actual physical invasion of a house 'or curtilage' for the purpose of making a seizure." Olmstead, 277 U.S. at 466.

After the decision in Olmstead, the Hester holding could best be stated as follows: the open field area beyond the curtilage is not an area entitled to Fourth Amendment protection. The Olmstead open fields doctrine's core, therefore, was that an open field was not a "constitutionally protected area."

However, Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 overruled the Fourth Amendment "constitutionally protected area" or actual physical invasion analysis epitomized by Olmstead. Katz holds that "the Fourth Amendment protects people--and not simply 'areas'--against unreasonable searches and seizures." Id. at 353, 88 S.Ct. at 512. However, "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. Id. at 351, 88 S.Ct. at 511.

Therefore, the present case, as stated above, is not inconsistent with either Hester or Katz and if it is inconsistent with Olmstead, it is only inconsistent with that portion of Olmstead which has been overruled with this Court. Therefore, the Federal Constitutional issues in the present case have been decided by this Court.

II. THE PETITION FOR A WRIT OF CERTIORARI SHOULD NOT BE GRANTED PURSUANT TO U.S. SUP. CT. RULE 17.1(b) BECAUSE THE DECISION OF THE MAINE SUPREME JUDICIAL COURT IS NOT IN CONFLICT WITH A DECISION OF THE FEDERAL COURT OF APPEALS.

The decision of the Maine Supreme Judicial Court in State of Maine v. Richard Thornton, supra. is not in conflict with the opinion and decision in United States v. Oliver, 686 F. 2d 356 (6th Cir. 1982) cert. granted 51 U.S.L.W. 3156 (U.S. January 24, 1983), (No. 82-15). Oliver is distinguishable from the present case. In Oliver, the 6th Circuit Court of Appeals overturned the

decision of a panel of that Court which held that the officers who conducted a warrantless search, which included traveling approximately a mile and a half on the landowner's private road, past "No Trespassing" signs, and walking around a locked gate to view growing fields of marijuana violated the landowner's expectation of privacy guaranteed by the Fourth Amendment, 686 F.2d. 356 at 358. However, even the 6th Circuit used the same analysis as the Maine Supreme Judicial Court did in Thornton in reconciling Hester with Katz, by citing the two-prong analysis for determining a reasonable expectation of privacy:

> ...generally, as here, the answer to that question requires reference to a "place". My understanding of the Rule that has emerged from prior decisions is that there is a two-fold requirement, first, that a person has exhibited an actual (subjective) expectation of privacy, and, second, that the expectation be one that society is prepared to recognize as "reasonable". Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable." cf. Hester v. United States, supra... Id. 389 U.S. at 361, 88 S.Ct. at 516. (U.S. v. Oliver, supra, 686 F.2d. 356 at 359, 360)

In Oliver v. United States, supra., it is important to note that the reasonable expectation of privacy was based largely on the fact that narcotics agents passed "No Trespassing" signs and a locked gate in making the search. (See footnote 4 at 686 F.2d. at 360) However, in the present case, there was other testimony indicating that Mr. Thornton had a reasonable expectation of privacy beyond the signs and fences. (See footnote 4, supra)

Also in Oliver, the officers found the marijuana approximately a mile and a half from the Defendant's house by going on a "gravel road". In contrast, the patches were found on the Thornton property by going up an overgrown "footpath" only approximately one hundred and fifty feet away from Mr. Thornton's driveway. (R. 58, 59)

Finally, in Oliver, the area where marijuana was found was in fact "open" and was a field. In the present case, the area searched was in no way open, as the area was heavily wooded.

It is clear that because of the size of the area of the Defendant's land in United States v. Oliver, supra. that the Court compared it with a desert island or mountain top areas which are remote, with no connection with anyone's residence. (686 F.2d at 360) However, in the present case, the residence of Mr. Thornton was only a short distance away from the area searched.

The 6th Circuit in Oliver held that:

> "...Under Hester and Katz, any expectation of privacy that an owner might have with respect to his open field is not, as a matter of law, and expectation that society is prepared to recognize is reasonable... (686 F.2d at 360)

This, however, does not mean that the decision in Thornton is inconsistent with Oliver's holding. The Court in Oliver did not say that a court should not investigate the circumstances to determine whether in fact there was an "open field". In the present case, using the two-prong analysis of Katz adopted by Oliver, the Maine Supreme Judicial Court simply determined that there was no open field, and then proceeded to determine whether there was a reasonable expectation of privacy in the "closed woods" searched. Therefore, State of Maine v. Richard Thornton, supra. is not inconsistent with United States v. Oliver, supra.

In addition, if the holding in Oliver were determined to be inconsistent with the present case, it is contended that this Court should not grant certiorari in the present case because the decision in Oliver is contrary to the decisions of the First Circuit which includes this State.[6] See United States v. Miller,

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[6] The Oliver decision (May 5, 1982) was not rendered when State v. Thornton was argued before the Maine Superior Court (February 23, 1982), nor was Oliver reported when the Maine Supreme Judicial Court heard arguments on Thornton (September 22, 1982).

589 F.2d 1117, 1125 (1st Cir. 1978), cert denied, 440 U.S. 958, 99 S.Ct. 1499, 59 L.Ed.2d 771 (1979) (no reasonable expectation of privacy because boat like automobile, carries lesser expectation of privacy than home or office); United States v. Taylor, 515 F.Supp. 1321, 1326 (D.Me. 1981) (no reasonable expectation of privacy in film delivered to commercial establishment for developing); United States v. Hensel, 509 F.Supp. 1376 (D.Me. 1981) (no reasonable expectation of privacy in Maine beach; "open fields" expectation applies); United States v. Balsamo, 468 F.Supp. 1363, 1378 (D.Me.1979) (standing to contest a search depends on defendant's legitimate and reasonable expectation of privacy). In addition, the Oliver decision is also contrary to the decisions of the Second, Fourth, Fifth, Seventh and Tenth Circuits who rejected the per se rule. United States v. Oliver, supra, at 686 F.2d 356, at 361. (Keith, dissenting)

It is significant to note that the Maine Supreme Judicial Court in Thornton explored all of the above decisions, some of which applied the open fields doctrine in determining that the open fields doctrine did not apply.

Finally, the Maine Supreme Judicial Court did not hold that the open fields doctrine was no longer the law in Maine, nor that Katz, supra had overruled the doctrine. To the contrary, the Supreme Judicial Court cited in Thornton numerous cases where the open fields doctrine was applied to Maine cases, and stated flatly that the Hester doctrine remains viable:

> We have recently noted that after Katz, the "Hester doctrine remains entirely intact" in Maine and elsewhere. Dow, 392 A.2d at 536; 453 A.2d 489 at 495. (A. 8) [Referring to State v. Dow, Me., 392 A.2d. 532 (1978)]

Therefore, there is no inconsistency in Thornton with any Federal Circuit Court of Appeals decision.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be denied.

Dated: March 9, 1983

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Donna L. Zeegers, Esq., hereby certify that I have caused three (3) copies of the foregoing "Brief in Opposition to Petition for Certiorari" to be served upon Wayne S. Moss, Petitioner's Attorney of Record, by depositing them in the United States Mail, postage prepaid, addressed as follows:

Wayne S. Moss
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Dated at Augusta, Maine, this 9th day of March, 1983.

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APPENDIX

STATE of Maine

v.

Richard THORNTON.

Supreme Judicial Court of Maine.

Argued Sept. 22, 1982.

Decided Dec. 6, 1982.

State appealed from an order of the Somerset County Superior Court granting defendant's motion to suppress observations made and items seized at defendant's property by the police. The Supreme Judicial Court, Carter, J., held that: (1) the evidence was sufficient to sustain the findings that the officers were not properly on property open to the public, were not on property of unknown ownership, and were not lawfully on neighboring property; (2) defendant had a clear expectation of privacy where he chose a spot for the marijuana patches which was observable only from his land, he posted no trespassing and no hunting signs on his land, and he generally excluded the public from his land, and thus the officers' warrantless search was an unreasonable invasion of defendant's privacy; and (3) the "open fields" doctrine was not applicable to justify the observation of the marijuana by the officers.

Affirmed.

1. Criminal Law ⇐1158(4)

Findings of fact supporting suppression order by a superior court justice will not be set aside unless clearly erroneous.

2. Criminal Law ⇐394.6(4)

In proceeding on defendant's motion to suppress observations made and items seized at defendant's property on which marijuana was growing, evidence was sufficient to sustain the findings that the police officers were not properly on property open to the public, were not on property of unknown ownership, and were not lawfully on neighboring property. U.S.C.A. Const. Amend. 4.

3. Searches and Seizures ⇐7(10)

Depending on circumstances and conduct of the individuals, it is entirely possible to have a reasonable expectation of privacy in a public phone booth and an unreasonable expectation of privacy at home. U.S. C.A. Const.Amend. 4.

4. Searches and Seizures ⇐7(20)

Defendant had a reasonable expectation of privacy in his land on which marijuana was growing where he chose a spot for the marijuana patches that was observable only from his land, he posted no trespassing and no hunting signs on his land, and he generally excluded the public from his land, and thus officers' warrantless search of the property was an unreasonable invasion of defendant's privacy which also tainted subsequent warrant and search. U.S.C.A. Const.Amend. 4.

5. Searches and Seizures ⇐7(10)

For the "open fields" doctrine to apply, two factual aspects of circumstances must be considered: first, openness with which the activity is pursued, and second, lawfulness of the officers' presence during their observations of what is open and patent. U.S.C.A. Const.Amend. 4.

6. Searches and Seizures ⇐7(10)

Although an activity may be observed, because, for example, it is conducted outside, participants may still have an expectation of privacy; under such circumstances, state must demonstrate legitimacy of the officers' position of observation and openness of the conduct in order to prove that the expectation of privacy is not objectively reasonable and that, therefore, police observations do not constitute a search. U.S. C.A. Const.Amend. 4.

7. Searches and Seizures ⇐7(20)

"Open fields" doctrine was not applicable to justify observation by police officers of marijuana patches on defendant's land where defendant made every effort to conceal his activity, and officers were never legitimately on defendant's property since they entered the land without a warrant and within no exception to the warrant requirement for specific purpose of verifying information to be used against defendant. U.S.C.A. Const.Amend. 4.

David W. Crook (orally), Dist. Atty. (orally), John Alsop, Asst. Dist. Atty., Skowhegan, Edward Morin, Law Student, for plaintiff.

Doyle, Fuller & Nelson, Donna Zeegers (orally), Augusta, for defendant.

Before McKUSICK, C.J., and GODFREY, NICHOLS, ROBERTS, CARTER, VIOLETTE and WATHEN, JJ.

CARTER, Justice.

The defendant was charged with unlawfully furnishing scheduled drugs in violation of 17-A M.R.S.A. § 1106 (1981). The defendant filed a motion to suppress the observations made and the items seized at the defendant's property by the police. After a suppression hearing in Superior Court (Somerset County), the justice granted the defendant's motion. The State appeals, pursuant to 15 M.R.S.A. § 2115-A (Supp. 1979) and Rule 37B, M.R.Crim.P., the suppression order. We deny the appeal.

An unidentified informant contacted Hartland Constable Arnold Hartford. The informant stated that he had been in a wooded area off the Davis Corner Road and had seen what he thought was marijuana growing in back of a mobile home in the area. Hartford contacted State Trooper

Crandall. Both officers talked to the informant, who did not want to be involved in any prosecutorial activity and who did not know who owned the property on which the marijuana was growing.

On July 31, 1981, Trooper Crandall and Constable Hartford left the Davis Corner Road and walked across the property[1] between the mobile home and an adjacent house until they reached an overgrown woods road, used only as a footpath. The men continued up the woods road and found marijuana growing in two clearings fenced in with chicken wire. This entire area was heavily wooded, except for the two clearings for the marijuana patches; it was not possible to see the patches from the defendant's house, from his driveway, from the public road, or from neighboring land. In fact, a person would have had to search to find the way to the patches.

An old stone wall, an old barbed wire fence and No Trespassing signs exist around the perimeter of the defendant's property, including a sign where the woods road enters the defendant's property. It was, however, possible to enter the defendant's property without observing anything except the stone wall. The defendant did not let people walk routinely through his property and the officers had no consent to enter the property on July 31, 1981. Although Trooper Crandall did not observe any boundaries or signs indicating the limits of the defendant's property, Trooper Crandall "figured" the marijuana was growing on the defendant's property because Crandall had observed marijuana on defendant's property in 1980.

After determining that the plants were marijuana, the officers left the property. Trooper Crandall checked maps at the Town Office to "find out for sure" who owned the property on which the plants were growing. On August 3, 1981, Trooper Crandall filed an affidavit and obtained a warrant to search the defendant's property for marijuana. Trooper Crandall based his belief of probable cause to search on his 1980 observations of marijuana on the defendant's property, on the July 31, 1981 observations, and on the information supplied by a "reliable, cooperating citizen." When asked by the suppression court justice why a warrant had not been procured before the July 3, 1981 visit to the property, Trooper Crandall replied: "I didn't know exactly where the marijuana was. I didn't know whose property it was on, and I didn't feel without checking it that I had enough information." Later, on August 3, 1981, the officers returned to the clearings on the defendant's property and seized the marijuana.

In his order, the suppression court justice found that because the District Attorney had abandoned any effort to prove probable cause for the warrant based on the informant's testimony, sufficient probable cause for a valid warrant depended on Crandall's observations. The justice further found that because the District Attorney had conceded that Crandall's July 31 visit was a warrantless search, the central issue in the motion to suppress determination was whether the July 31 search came within an exception to the warrant requirement.

The suppression court justice concluded that the two officers had entered the defendant's property, which was posted with a number of signs prohibiting trespassing and hunting, by walking part way along the defendant's property and then crossing a stone wall, which was in a state of disrepair. The officers entered the property without license in order to corroborate the informant's tip. The secluded location, chosen by the defendant for the patches, and the defendant's efforts to exclude the public from his property evidenced the defendant's reasonable expectation of privacy on his property. Because the officers were not innocently on public property, property of unknown ownership, or neighboring proper-

1. At the hearing, defense counsel tried to elicit testimony from both Crandall and Hartford that they had told counsel during telephone conversations that they had walked up the defendant's driveway to approach the patches. Crandall denied making that statement; Hartford initially did not remember but later denied making the statement.

ty, and because no other exception [2] to the warrant requirement was applicable, the justice found that the officers' July 31 visit to the defendant's property was an unlawful search. After finding that the information obtained in Crandall's 1980 search was stale in 1981 and may also have been obtained during an unlawful search and that the observations made during the July 31 unlawful search could not supply probable cause, the justice ruled that the warrant issued for the August 3 search and seizure was invalid. He, therefore, suppressed evidence of observations made and items seized on the defendant's property on August 3.

On appeal, the State contends: (1) three of the suppression court justice's findings of fact are clearly erroneous; (2) the defendant could have had no reasonable expectation of privacy; and (3) the suppression justice erred in questioning and failing to apply the "open fields" doctrine. We disagree.

1. *Findings of Fact*

[1] The State challenges as clearly erroneous three findings of fact by the suppression justice. Findings of fact supporting a suppression order by a Superior Court justice will not be set aside unless clearly erroneous. *State v. Dunlap*, 395 A.2d 821 (Me.1978). The justice found that the defendant's property was posted with signs prohibiting trespassing and hunting. The defendant's wife testified directly to the fact that such signs were posted on the defendant's property. The defense also offered in evidence a photograph of a No Trespassing sign on the defendant's property.

[2] Second, the justice found that the two officers went partly up the defendant's driveway en route to the marijuana patches during the July 31 visit. In fact, the officers denied using that driveway. Evidence was introduced that they had used some driveway. The suppression justice was not compelled to accept the officer's testimony on the point, even if it was uncontradicted. *Qualey v. Fulton*, 422 A.2d 773, 775 (Me. 1980). The suppression court's finding, even if erroneous, was, however, harmless error. M.R.Crim.P., Rule 52(a); *State v. True*, 438 A.2d 460, 467 (Me.1981) (preserved error harmless if 'appellate court believes it highly probable that the error did not affect the judgment'). Even absent this finding, there was sufficient evidence to support the justice's conclusions that the officers were not properly on property open to the public, were not on property of unknown ownership, and were not lawfully on neighboring property. This evidence included the findings that the property was posted and surrounded by a wall; that Crandall "figured" the marijuana was on the defendant's property; that Crandall had seen marijuana on the defendant's property in 1980; that Crandall wanted to check the property in order to get more information for the warrant; and that the marijuana patches could not be seen from neighboring land.

Third, the justice found that the two officers crossed a stone wall in disrepair when entering the defendant's property. The defendant's wife testified that although the stone wall was dilapidated, a person would know he was going over a wall when entering the property in the area where the officers entered the property.

2. The burden was on the state to prove an exception to the warrant requirement. *State v. Linscott*, 416 A.2d 255, 259 (Me.1980); *State v. Dunlap*, 395 A.2d 821, 824 (Me.1978).

The five basic exceptions include: consent, *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); incident to a lawful arrest, *Michigan v. DeFillippo*, 443 U.S. 31, 99 S.Ct. 2627, 61 L.Ed.2d 343 (1979); probable cause and exigent circumstances, *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977); hot pursuit, *Warden v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967); and stop and frisk, *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The "plain view doctrine" is not an exception to the warrant requirement. Rather, this doctrine allows the police to seize evidence in plain view, inadvertently observed by the police while lawfully searching with respect to another crime or purpose. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564, *reh'g denied*, 404 U.S. 874, 92 S.Ct. 26, 30 L.Ed.2d 120 (1971).

Trooper Crandall's testimony that he did not see any fences or boundaries did not compel rejection by the suppression justice of the testimony of the defendant's wife. The finding of the justice was not clearly erroneous. *State v. McKenzie*, 161 Me. 123, 134–35, 210 A.2d 24, 31 (1965) (clearly erroneous test is that "'due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses'").

II. *Reasonable Expectation of Privacy*

The suppression court justice found that the defendant's effort to conceal the patches and to exclude the public from his land evidenced a reasonable expectation of privacy. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). The officers' warrantless search was, therefore, an unreasonable invasion of the defendant's privacy. *State v. Blais*, 416 A.2d 1253, 1256 (Me.1980). This violation of the defendant's fourth amendment rights also tainted the subsequent warrant and search. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

The State relies on *Hester v. United States*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924); *State v. Peakes*, 440 A.2d 350 (Me.1982); and *State v. Dow*, 392 A.2d 532 (Me.1978) and argues that the defendant could not have a reasonable expectation of privacy in an area accessible to the public because fourth amendment protection does not extend to "open fields" and similar areas. The State concludes, therefore, that there was no search by the officers on July 31,[3] *Peakes* 440 A.2d at 353; that they observed only what was "open and patent," *State v. Poulin*, 268 A.2d 475, 480 (Me.1970), and that these observations provided the basis for a valid search warrant used on August 3.

The State misconstrues these cases. In *Katz*, the Court made clear that the fourth amendment protection against unreasonable searches and seizures is a function of an individual's expectation concerning his activities and the reasonableness of those expectations: "the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection ... [b]ut what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." 389 U.S. at 351, 88 S.Ct. at 511, 19 L.Ed.2d at 582; *State v. Sweatt*, 427 A.2d 940, 946 (Me. 1981).

In his concurrence in *Katz*, Justice Harlan recognized that the majority's seeming personalization of the fourth amendment was not inconsistent with the prior cases. Citing *Hester*, Justice Harlan reasoned that activities conducted in the open are not protected because even if there was an expectation of privacy, the expectation would be unreasonable. 389 U.S. at 361, 88 S.Ct. at 516, 19 L.Ed.2d at 588.

The Maine cases are in accord. We noted after *Katz* that

> [t]he issue of whether government action does or does not constitute a search is now understood to depend less upon the designation of an area ... than upon a determination of whether the examination is a violation of privacy on which the individual justifiably relied as secure from invasion.

State v. Gallant, 308 A.2d 274, 278 (Me. 1973) (radiographic scanning by customs of official mail entering country not search); *United States v. Miller*, 589 F.2d 1117, 1125 (1st Cir.1978), *cert. denied*, 440 U.S. 958, 99 S.Ct. 1499, 59 L.Ed.2d 771 (1979) (no reason-

3. In his order, the suppression court justice stated that the District Attorney had conceded that the July 31 visit was a warrantless search and that the only issue was whether an exception to the warrant requirement applied. Although the State disputes this finding, the following exchange indicates either a concession on, or a waiver of, the issue of the occurrence of a search:

> [Defense counsel]: Your Honor, the affidavit of the police officer states that he went into the property and saw the marijuana, and then got a search warrant, it is fairly clear.
>
> [Prosecutor]: There is no question but what that happened.
>
> The Court: You have the burden of going forward, in that event, [Prosecutor].
>
> [Prosecutor]: Yes, Your Honor.

able expectation of privacy because boat, like automobile, carries lesser expectation of privacy than home or office); *United States v. Taylor*, 515 F.Supp. 1321, 1326 (D.Me.1981) (no reasonable expectation of privacy in film delivered to commercial establishment for developing); *United States v. Hensel*, 509 F.Supp. 1376 (D.Me.1981) (no reasonable expectation of privacy in Maine beach; "open fields" expectation applies); *United States v. Balsamo*, 468 F.Supp. 1363, 1378 (D.Me.1979) (standing to contest a search depends on defendant's legitimate and reasonable expectation of privacy); *Peakes*, 440 A.2d at 352–53 (officer's observation of defendant's marijuana from neighbor's land not search); *State v. Sapiel*, 432 A.2d 1262, 1266 (Me.1981) (officer's proper entry on premises not violation of justifiable property interest; observation of evidence in plain view not search); *State v. Rand*, 430 A.2d 808, 818 (Me.1981) (absent exigent circumstances, fact that police are conducting official investigation does not justify intrusion on private property in breach of reasonable expectation of privacy); *Sweatt*, 427 A.2d at 945 (legitimate expectation of privacy in safe and contents; secrecy is not requisite for legitimate expectation of privacy); *State v. Albert*, 426 A.2d 1370, 1373 (Me.1981) (any conceivable expectation of privacy with respect to car had ceased when police searched three weeks after car had left defendant's possession and control); *Blais*, 416 A.2d at 1256 (no search warrant required if State establishes absence of any reasonable expectation of privacy); *State v. Johnson*, 413 A.2d 931, 933 (Me.1980) (knowledge of dead body on premises created exigent circumstances permitting warrantless entry); *State v. Littlefield*, 408 A.2d 695, 697 (Me.1979) (no search when defendant observed walking along public street); *State v. Barclay*, 398 A.2d 794, 798 (Me.1979) (necessary difference between search of store or dwelling house and search of ship, boat, wagon or car); *State v. Dow*, 392 A.2d 532, 535 (Me.1978) ("[o]pen, obvious and notorious criminal activity conducted in a public place has never been accorded constitutional protection under the fourth amendment"; warden's observations of short lobsters open to public view not search); *State v. Cowperthwaite*, 354 A.2d 173, 175–76 (Me.1976) (observation of shotgun, cartridge, and hunting knife by officer standing at open door of vehicle not search); *State v. Hamm*, 348 A.2d 268, 272 (Me.1975) ("[t]he Court in *Katz* broadened the scope of fourth amendment protection to include those areas which the individual attempts 'to preserve as private' "); *State v. Crider*, 341 A.2d 1, 4 (Me.1975) (no invasion of privacy when police enter without force common hallway of multiple-unit dwelling in furtherance of investigation); *State v. Koucoules*, 343 A.2d 860, 868 (Me. 1974) (search exceeding bounds of consent to search becomes invasion of privacy rendering search unreasonable); *State v. Richards*, 296 A.2d 129, 134 (Me.1972) (governmental rummaging about in citizen's belongings, even without purpose of seeking criminal violations, is search); *State v. Stone*, 294 A.2d 683, 688–89 (Me.1972) (rifle on back seat of automobile was knowingly exposed to public view; observation not unconstitutional intrusion into protected area); *Poulin*, 268 A.2d at 480 (observation of safe in open automobile trunk not search); *McKenzie*, 161 Me. at 137, 210 A.2d at 32 (not search to observe that which is open and patent).

[3, 4] Depending on the circumstances and the conduct of the individuals, it is entirely possible to have a reasonable expectation of privacy in a public phone booth, *Katz*, 389 U.S. at 348, 88 S.Ct. at 509, 19 L.Ed.2d at 580, and an unreasonable expectation of privacy at home. *Lewis v. United States*, 385 U.S. 206, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966), *reh'g denied*, 386 U.S. 939, 87 S.Ct. 951, 17 L.Ed.2d 811 (1967). In the present case, the defendant's conduct evidenced a clear expectation of privacy. He chose a spot for the marijuana patches that was observable only from his land; he posted No Trespassing and No Hunting signs on his land; he generally excluded the public from his land.

It has never been the law in this State that any expectation of privacy for activity conducted in an area accessible to the public

is *per se* unreasonable. Rather, the proper inquiry must be

> [h]aving in mind the purposes to be served by the Fourth Amendment, made applicable to the states by the Fourteenth, should we not disregard such conclusory property law concept and determine the reasonableness of the police entry by responding to the following relevant inquiry, what under all the existing circumstances, if anything, wholly defeated or partially reduced under the law the reasonable expectations of privacy which the occupants ... had a right to entertain?

Crider, 341 A.2d at 5. Under the circumstances of this case, we find nothing that can be taken to have wholly defeated or partially reduced the defendant's reasonable expectation of privacy except the visit by the officers to the property for the specific and admitted purpose of gathering information for a subsequently procured search warrant.

III. *The "Open Fields" Doctrine*

The State contends, finally, that (1) the suppression court justice clearly erred in apply the "*Katz* expectation of privacy analysis" to this case because the case is governed by the "'open fields' doctrine analysis developed in Hester ..."; and (2) the justice clearly erred in questioning the viability of the doctrine of *Hester*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898. In his order, the justice did observe, parenthetically, that "[t]he extent to which the open fields doctrine is still viable after *Katz* ... is open to considerable doubt." This observation was preceded, however, by the finding that neither "the plain view or open fields exception to the warrant requirement is applicable."

We have recently noted that after *Katz*, the "*Hester* doctrine remains entirely intact" in Maine and elsewhere. *Dow*, 392 A.2d at 536. Regardless of his estimations of the doctrine's viability, the suppression justice applied the law of the State and found inapplicable the "open fields" exception to the warrant requirement. His conclusion concerning the availability of this exception under these circumstances was correct.

[5] In Maine, for the "open fields" doctrine to apply, two factual aspects of the circumstances must be considered: (1) the openness with which the activity is pursued, *Peakes*, 440 A.2d at 353 ("the officers observed something which was 'open and patent' to the Defendant's neighbors and their invitees"); *Dow*, 392 A.2d at 535 (open, obvious criminal activity conducted in public place not constitutionally protected); and (2) the lawfulness of the officers' presence during their observations of what is open and patent. *Dow*, 392 A.2d at 535 ("[t]he warden, who apparently had as much right to be in the parking lot as the defendants, merely observed that which was completely open to public view ..."); *Peakes*, 440 A.2d at 353 ("the Waldoboro officers had permission to be where they were when they saw the marijuana plants"); *Stone*, 294 A.2d at 689 ("without any unlawful initial intrusion into the interior of the automobile, Trooper Smith saw, as knowingly exposed to public view (even though inside the automobile) a 30 calibre carbine rifle ...").

[6, 7] Although an activity may be observed, because, for example, it is conducted outside, the participants may still have, as in this case, an expectation of privacy. *Katz*, 389 U.S. at 351–52, 88 S.Ct. at 511, 19 L.Ed.2d at 582. Under such circumstances, the State must demonstrate the legitimacy of the officers' position of observation and the openness of the conduct in order to prove that the expectation of privacy is not objectively reasonable and that, therefore, police observations do not constitute a search. In the circumstances of this case, the State can demonstrate neither requirement for the application of the open fields doctrine. The defendant made every effort to conceal his activity; nothing about his enterprise was open, patent, or knowingly exposed to the public. Secondly, the officers were never legitimately on the defendant's property; they entered the defendant's land without a warrant, and within no

exception to the warrant requirement, for the specific purpose of verifying information to be used, ultimately, against him.

Further, we note that the State's erroneous assumption that the fact that the scene of the criminal activity occurred in an area akin to an "open field" precludes the need for further fourth amendment analysis. The determination of a lawful search and seizure under fourth amendment analysis does not involve plugging in one of several mutually exclusive theories or doctrines, such as the "open fields" doctrine, depending on the particular facts. Surely a determination of fourth amendment protection involves a more cohesive and reasoned approach.

Although separated by forty-three years, the *Hester* doctrine and the *Katz* doctrine can be reconciled; indeed, such reconciliation is required. *Dow*, 392 A.2d at 536; *State v. Brady*, 379 So.2d 1294, 1295 (Fla. 1980) ("*Katz* did not rule out the open fields of *Hester* altogether"). Under both analyses, the reasonableness of any subjective expectation of privacy would be questioned: "the question of the reasonable right of privacy may well still depend in part on whether the field is truly open or whether it is fenced with the obvious purpose of keeping people out." *Brady*, 379 So.2d at 1295. There is little doubt that the *Katz* majority would have agreed that Hester had no reasonable expectation of privacy in distributing moonshine whiskey in an open field on his father's land. *Katz*, 389 U.S. at 361, 88 S.Ct. at 516, 19 L.Ed.2d at 588 (Harlan, J., concurring).

The point is not that the area of the marijuana patches was accessible to the public, *Katz*, 389 U.S. at 361, 88 S.Ct. at 516, 19 L.Ed.2d at 588 (Harlan, J., concurring), or that, under different circumstances, the defendant's land might have been open woods. The dispositive point is that by his actions the defendant indicated that he expected his land to be a private place. Under these facts, we think that that expectation was reasonable. Trooper Crandall "figured" the marijuana was on the defendant's land. The two officers walked directly to the chicken-wire enclosures; it was not possible to observe the patches except from such close proximity. The officers were "checking" the property, without permission or authority, to ensure "enough information." This conduct was a search; the State has not proved the reasonableness of this search. *Linscott*, 416 A.2d at 259. An unreasonable search, under every doctrine and theory, is proscribed by the fourth amendment.

The entry is:

Judgment affirmed.

All concurring.

STATE OF MAINE
SOMERSET, SS

SUPERIOR COURT
CRIMINAL ACTION
Docket No. CR82-10

STATE OF MAINE)
)
vs.) ORDER
)
RICHARD THORNTON)

This criminal action is before the Court upon the defendant's motion to suppress the fruits of a search of his property in Hartland, Maine, conducted by law enforcement officers on August 3, 1981, pursuant to a search warrant issued that day.

At the hearing on April 5, 1982, the Court heard the testimony of the affiant officer, Trooper Carol Crandall, Constable Harold Hartford, and Linda Thornton, the defendant's wife. The affidavit indicates that, relying upon information supplied by a "reliable cooperating citizen," who claimed to have observed marijuana plants growing in a penned area in woods behind the defendant's residence on the Davis Corner Road, Hartland, Trooper Crandall went to that area of the defendant's property on July 31, 1981 and discovered marijuana plants to be growing. Additionally, the affidavit claims that approximately one year previously, that is, in the summer of 1980, Trooper Crandall had observed marijuana growing on other locations on the defendant's property. Constable Hartford accompanied Trooper Crandall on his visit to the Thornton property on July 31, 1981.

The District Attorney, at the hearing on this motion, abandoned any claim that the informant citizen was reliable and credible enough that his information, standing alone, constituted probable cause for the warrant which issued. At any rate, no evidence as to the grounds upon which that informant's reliability or credibility could be established, or any evidence of corroborating circumstances as to the informant's observations, appears in the affidavit or

was introduced at the hearing, beyond a conclusionary allegation of reliability. Absent such support for the informant's tip, probable cause for the warrant must be based upon the observations of the affiant officer.

The central issue on this motion, then, is whether the visit by Trooper Crandall to the defendant's property on July 31, 1981, which the District Attorney concedes was a warrantless search, comes within any exception to the warrant requirement of the Fourth Amendment of the United States Constitution. The State bears the burden of proof on this issue. If no such exception is found, then the search would be unlawful, and thus tainted, and the observations made could not serve to provide probable cause for the warrant.

The evidence indicates that the wooded area where the marijuana was growing, within two fenced and cleared enclosures, was adjacent to an overgrown footpath or so-called tote road in the western part of the defendant's 30 acre, rural property. (See Defendant's Exhibit #12) The enclosures were not visible either from the public road, called the Davis Corner Road and forming part of the defendant's southern boundary, from the defendant's driveway or residence in the eastern part of the property, or from any other point outside the defendant's property, upon neighboring land. The distance from the house, which has an entrance only on the east, or driveway side, to the two enclosures in the west was at least several hundred feet. The perimeter of the Thornton property was posted with a number of signs prohibiting trespassing and hunting.
In entering upon the Thornton property on July 31, 1981, the two officers went partly up the driveway from the Davis Corner Road, and then crossed a stone wall in disrepair into the woods, encountering the footpath, which they followed away from the direction of the house to the location where they believed the marijuana to be growing. The testimony of Trooper Crandall and Constable Hartford indicates that they had no license to be on the Thornton property; their intent

was to corroborate the informant's tip. As is evident from the secluded location chosen for his horticultural enterprise, the defendant had no intent to expose the enclosures to either public or police view. The intent to avoid casual public view, and the efforts taken to generally exclude the public from his wooded property, indicates the defendant had a reasonable expectation of privacy thereon. The officers were not innocently upon any property open to the public (the footpath or tote road was evidently not a public way), or in an area in which ownership of the land was unknown. Neither were the officers lawfully upon any neighboring property when they discovered the marijuana; such a view was impossible from adjacent land. The Court does not find that either the plain view or open fields exception to the warrant requirement is applicable. (The extent to which the open fields doctrine is still viable after Katz v. United States, 389 U.S. 347 (1967) is open to considerable doubt. See, generally W. LaFave, Search & Seizure § 2.4 (1978)). The case of Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861 (1974), relied upon by the State, presents a different fact situation. There, the government pollution inspector saw plumes of smoke that were exposed to public view in the adjacent city, and then entered upon a part of the defendant's premises to which the public was not excluded in order to conduct tests.

Accordingly, the Court finds that the warrantless search of July 31, 1981 was an unreasonable and unlawful violation of the defendant's rights and the observations from it cannot provide probable cause for the subsequently issued warrant. Neither can the information obtained in the 1980 search alluded to in the affidavit provide probable cause for the warrant; that information was not only stale in 1981, but may also have been the fruit of an unlawful, warrantless search. The warrant having issued without probable cause, the search and seizure of August 3, 1981 pursuant to it was thus in violation of the defendant's

Fourth Amendment rights.

The motion to suppress is GRANTED. It is hereby ORDERED and DECREED that all articles and items of evidence of every kind and description that were unlawfully seized from the property of the defendant and the defendant's premises at Hartland, Maine, shall not be received or admitted into evidence and no testimony or comment shall be received respecting the same and they are hereby suppressed; all statements and/or admissions both oral and written that may have been made by the defendant as a result of said illegal search and seizure shall not be received or admitted into evidence and no testimony or comment shall be received respecting the same and they are hereby suppressed.

Dated: April 9, 1982

Norton A. Brody
Justice, Superior Court

AFFIDAVIT AND REQUEST FOR SEARCH WARRANT

I, Carroll E. Crandall, after being duly sworn, depose and say that:

I am a Trooper for the Maine State Police and have been for four and a half years. Your affiant has received formal drug training at the Maine Criminal Justice Academy in February 1975 and the Maine State Police Academy in March of 1977. In this training I received knowledge on the appearance, composition, and effects of marijuana. I have made several seizures of marijuana resulting in arrests and convictions. I have sent samples of marijuana to laboratories for analysis and reports have come back from the chemist to show that in fact the substance that I sent to the chemist was marijuana (Cannibis). I have the ability to accurately identify marijuana in either a growing or dried state.

On information and belief supplied by a reliable, cooperating citizen that on or about the thirty-first day of July, A.D. 1981, in Hartland, County of Somerset and State of Maine, that said citizen did observe marijuana plants growing in several areas penned in by wire mesh in a wooded area behind the residence of Richard Thornton at Davis Corner Road, Hartland, Maine.

That your affiant went to said wooded area on August 3, 1981, and discovered marijuana plants to be growing at the place and position behind the said residence as described by said reliable informant.

That your affiant made said observations by looking through said wire mesh fence (chicken wire).

That your affiant does further discribe said wire mesh (chicken wire) as being approximately 2-3 feet high and that your affiant was able to look over and through said wire mesh fence and did observe numerous marijuana plants 3 to 4 ft. high growing in the ground and being cultivated upon said property. Your affiant does estimate that there are between 30 and 40 marijuana plants at said location.

AFFIDAVIT AND REQUEST FOR SEARCH WARRANT

That your affiant requests permission to search for marijuana in the aforementioned wooded area owned by Richard Thornton, more particularly described as a wooded area situated in back of a wood frame house of natural wood color with several outbuildings. The parcel of land is located on the north side of the Davis Corner Road in said Hartland and bordered on the south side by the property of Linwood Leavitt and the property of Gerald Wheeler, bordered on the east side by Henry Parker, bordered on the north side by the property of Roland Reynolds and the property of Steven McNichol, and bordered on the west side by the property of Ellery Ricker.

Your affiant does reasonably believe that probable cause does exist and that the following subject, Richard Thornton, is in violation of Title 17-A Sections 1107 and 1114 of Maine Revised Statutes Annotated.

WHEREFORE, your affiant requests the court to issue a search warrant directing your affiant to conduct a search of the above-described wooded area at Davis Corner Road, Hartland, in the daytime, and that your affiant be further directed to seize and return to the court any marijuana (cannibis) that may be located on said premises.

WHEREFORE, your affiant does further request that he be commanded to search all lands owned or occupied by the said Richard Thornton, excluding buildings and structures designed to exclude human beings. That your affiant did observe approximately one year ago evidence that marijuana was grown on other locations on the property of the said Richard Thornton. That said observation did consist of approximately one year ago your affiant observing approximately 1/4 acre of land that showed evidence that marijuana plants had been previously cultivated and harvested during the Fall of 1980.

DATED: August 3, 1981

Carroll E. Crandall
Carroll E. Crandall

STATE OF MAINE

SOMERSET, ss.

Subscribed and sworn to me by the said Carroll E. Crandall, this third day of August, A.D. 1981, at Skowhegan, County of Somerset and State of Maine.

Richard C. Poland
Complaint Justice
12th District Court
Somerset Division
Skowhegan, Maine

AFFIDAVIT AND REQUEST FOR SEARCH WARRANT

I, Carroll E. Crandall, after being duly sworn, depose and say that:

I am a Trooper for the Maine State Police and have been for four and a half years. Your affiant has received formal drug training at the Maine Criminal Justice Academy in February 1975 and the Maine State Police Academy in March of 1977. In this training I received knowledge on the appearance, composition, and effects of marijuana. I have made several seizures of marijuana resulting in arrests and convictions. I have sent samples of marijuana to laboratories for analysis and reports have come back from the chemist to show that in fact the substance that I sent to the chemist was marijuana (Cannibis). I have the ability to accurately identify marijuana in either a growing or dried state.

On information and belief supplied by a reliable, cooperating citizen that on or about the thirty-first day of July, A.D. 1981, in Hartland, County of Somerset and State of Maine, that said citizen did observe marijuana plants growing in several areas penned in by wire mesh in a wooded area behind the residence of Richard Thornton at Davis Corner Road, Hartland, Maine.

That your affiant went to said wooded area on August 3, 1981, and discovered marijuana plants to be growing at the place and position behind the said residence as described by said reliable informant.

That your affiant made said observations by looking through said wire mesh fence (chicken wire).

That your affiant does further discribe said wire mesh (chicken wire) as being approximately 2-3 feet high and that your affiant was able to look over and through said wire mesh fence and did observe numerous marijuana plants 3 to 4 ft. high growing in the ground and being cultivated upon said property. Your affiant does estimate that there are between 30 and 40 marijuana plants at said location.

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[4]

Q For the past four and a half years?
A Five and a half years.
Q And you were so employed on August 3, 1981?
A Yes, I was.
Q And did you have an occasion on August 3, 1981, to go to the residence -- well, not the residence -- but to go to the wooded area in Hartland and observe marijuana plants?
A Yes, I did.
Q Now before going there, can you tell the Court whether or not you had any training with the handling and identification of marijuana?
A Yes, I have.
Q And can you summarize that briefly?

MS. ZEEGERS: Your Honor, I object. This is a Motion to Suppress, and the issue really is whether the officer had a right to go on this property, and not whether he is an expert. We're not calling him an expert in the viewing of marijuana.

THE COURT: Mr. Alsop?

MR. ALSOP: Your Honor, it seems to me that the issue might come up as to whether or not there is probable cause for the issuance of a warrant, and certainly his ability to identify marijuana would relate to that issue, and once again, I am a little confused as to the particular

MS. ZEEGERS: Your Honor, I object. I think we have to go onthe basis of what is in the affidavit and in the warrant. The warrant did not issue on sworn testimony.

THE COURT: That objection is overruled. He may answer.

A I was contacted by a Harold Hartford, he is the Constable in Hartland. He had just talked with the subject, and the subject said he had been in the wooded area and had seen some marijuana, and wanted to get in touch with him. Officer Hartford and myself talked to the gentleman who indicated that he didn't want to be involved.

THE COURT: That he did or he did not?

A He did not. He said that he had just been off the Davis Corner Road and had seen some marijuana growing, or what he thought to be marijuana, and the Constable and I went out in back of a mobile home, beside the road.

Q Well, before telling us where you went, why don't you go to the board and draw a diagram of the area, telling where you went and the particular area of Hartland.

A (The witness leaves the witness stand and goes to the blackboard.) This would be the Davis Corner Road, north would be in this direction here. Mr. Thornton's driveway goes right in there, and his house is right in here.

A (cont'd) There is a mobile home located right in this area, and another house right in this area. It was indicated to us by the informant that the marijuana was growing somewhere in back of the mobile home, and we went onto the property, between the mobile home and the house, and right in here there is a wood road, like that, we walked in from the road and up this woods road, and right in this area there was a chicken wire fence, probably three or four feet high, and probably twelve or fourteen foot square, and there was marijuana growing inside that fence.

Q Now let me ask you some questions about that diagram. You indicated that north was on top of the board?

A Yes.

Q And this horizontal stripe here is the road?

A Yes.

Q And that's what, the Davis Road?

A The Davis Corner Road.

Q Why don't you write in the Davis Corner Road right there. Is that area of the Davis Corner Road in Hartland, is that a rural area or a fairly built-up area?

A It is a rural area.

Q And you have indicated two rectangles lying north of the Davis Corner Road, which I believe you said are residences?

A Yes.
Q And when was that picture taken?
A That would be in the winter, January.
Q And approximately how far are the other -- other than the two fenced-in areas we are talking about -- about how far from the border of your property --
THE COURT: Which border?
MS. ZEEGERS: This border here.
THE COURT: Southerly border?
MS. ZEEGERS: Yes, southerly border.
A Approximately two hundred and fifty feet.
Q And approximately how far are those fenced-in areas from the driveway?
A Oh, one hundred and fifty or two hundred feet.
THE COURT: How far? One hundred and fifty?
A Approximately.
THE COURT: From which part of the driveway?
A Well, where she pointed was toward the end of the driveway.
THE COURT: Toward the intersection of the Davis Corner Road end of the driveway?
A Yes.
THE COURT: And how far do you say it was?
A From where the mesh chicken wire is to the back of the property behind the houses was measured at two hundred,

A (cont'd) or approximately two hundred and fifty feet.
Q So it was a little further than two hundred and fifty feet to the driveway then. I would like to show you what has been marked as Defendant's Exhibits Nos. 10, 9, and 11, and ask you if you recognize them?
A Yes.
Q And would you tell us what each of them are?
A The first one is No. 11, is from the Davis Corner Road looking down our driveway, and standing in the road.

THE COURT: When you say looking down, do you mean looking in a northerly direction?

A Yes. A northerly direction to the house. And No. 10, it is a little farther down the driveway, looking north. And the third one, No. 9, is the house itself.

THE COURT: And that's looking from the driveway in a northerly direction toward the house?

A Yes.
Q How far from your driveway is the No Trespassing sign?
A To the first one? I would say maybe thirty feet or twenty feet, I'm not exactly sure. It is close to the driveway.
Q And you say twenty or thirty feet from the driveway?
A Yes, to the right of the driveway.
Q Mrs. Thornton, what is the approximate total amount of cleared land that you have in the driveway on your

Q (cont'd) property, excluding the buildings and foundation?

A The only other areas are the garden and the two fenced-in areas.

Q And do you know approximately how big that would be?

A The garden is twenty-eight, sixty-two, approximately, and the other small ones are six by six and nineteen by six and a half.

Q Are there any footpaths that go from those two fenced-in areas to your house?

A Well, yes, indirectly.

Q Have you or your husband ever allowed anyone to routinely walk through your property to get to anyone else's property, or to the road?

A No.

Q And you have not allowed hunters on your property?

A No.

Q And you have not allowed other trespassers on your property?

MR. ALSOP: Your Honor, I object. That is leading.

THE COURT: Sustained.

Q Now these footpaths that you have referred to coming from this area on the north side of your property, from the boundary of your property getting to these two fenced-in areas, would you be able to get through there?

THE COURT: The objection is sustained.

Q Have you been out to these plots?

A Yes, I have.

Q And more than once during the course of the summer of 1981?

A Yes.

Q And were you aware of what was growing out there?

A Yes.

Q Is that in fact why they were growing out in that area?

A Yes.

Q Is it fair to say that you or your husband did not want it to be viewed from the road; is that true?

A True.

Q In fact, they were out in a well-wooded area?

A That's true.

Q And the fence around them was to keep out the animals?

A Anything that would bother it, not necessarily animals.

THE COURT: Police and things like that?

Q Was it possible to see through the fence?

A If you looked through the fence, yes.

Q How do you get inside of those fences?

A Pull the wire down.

Q So there was no gate on it or anything of that sort?

A No. You would have to search to find your way in.

Q This so-called tote road, or footpath, is quite grown

ORIGINAL

SUPREME COURT OF THE UNITED STATES

No. 82-1273

STATE OF MAINE,
Petitioner,
v.
RICHARD THORNTON,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

NOW COMES the Respondent Richard Thornton and by and through his attorney requests that this Court allow him to defend the above action in forma pauperis as Respondent is unable to pay for costs in defending the above appeal. Proof of poverty is hereinafter set forth in the attached affidavit which shall be incorporated by reference into this Motion.

Submitted by:

Donna L. Zeegers, Esq.
Attorney for Respondent

DOYLE & NELSON
P. O. Box 2709
Augusta, Maine 04330

Dated: March 9, 1983

ORIGINAL

SUPREME COURT OF THE UNITED STATES

No. 82-1273

STATE OF MAINE,
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V.

RICHARD THORNTON,
Respondent.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Richard Thornton, being first duly sworn, on oath depose and say:

1. That I am the Respondent in the above-entitled case;

2. That in support of my motion to defend an appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to defend myself against the issue which the State of Maine has presented for appeal;

3. I further swear that the information below relating to my ability to pay the costs of defending the appeal are true:

a. I am currently unemployed and have been unemployed since November, 1982. Prior to my unemployment, I received approximately $1140 per month; however, for the last two winters, I have been unemployed;

b. I currently receive unemployment compensation of $129 per week, and interest from my savings account is approximately $12 for the last twelve months;

c. My savings account totals $110.00; I have no checking or other accounts;

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d. My only real estate is my two-room house which has no plumbing and the surrounding 38 acres of land, more or less; the total value of this real estate is under $10,000.00;

e. I own a 1975 Dodge Dart worth approximately Five Hundred ($500) Dollars;

f. The persons dependent on me for support are my wife, Linda Thornton, and my children, Dylan Thornton and Kaili Welch, who all live with me.

4. I hereby certify that I cannot because of my poverty pay for the defense of the above appeal and still be able to provide myself and my dependents with the necessities of life.

5. I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

Dated: March 9, 1983

Richard Thornton

STATE OF MAINE
Kennebec, ss. March 9, 1983

Personally appeared the above-named Richard Thornton and made oath that the statements made and subscribed by him in the above Affidavit are true.

Before me,

Notary Public

MY COMMISSION EXPIRES
JUNE 20, 1987